BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RENEE ARMSTRONG	)	
Claimant	)	
VS.	)	
	)	Docket No. 192,037
NORTH AMERICAN PHILIPS LIGHTING	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requested review of the Award entered by Assistant Director Brad E. Avery dated April 24, 1996. The Appeals Board heard oral argument on September 19, 1996.

APPEARANCES

Claimant appeared by her attorney, Norman R. Kelly of Salina, Kansas. Respondent and its insurance carrier appeared by their attorney, John W. Mize of Salina, Kansas. The Workers Compensation Fund appeared by its attorney, David G. Shriver of McPherson, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Assistant Director found that claimant failed to file an application for hearing with the Director of the Division of Workers Compensation within one year of the date of accident and, therefore, denied claimant's request for benefits. As indicated by the parties in their briefs and at oral argument, the issues now before the Appeals Board on this review are:

(1) Whether claimant provided respondent with timely notice of accident and, if not, whether lack of timely notice prejudiced the respondent.

(2) Whether claimant provided respondent with timely written claim.

(3) Whether claimant timely filed an application for hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award denying benefits entered by the Assistant Director should be set aside and this proceeding should be remanded for further consideration.

Claimant alleges she sustained work-related accidents on both November 20, 1992, and February 4, 1993. Although both accidents occurred before July 1, 1993, the effective date of legislative amendments to K.S.A. 44-557(c), the Assistant Director applied those amendments to this proceeding, found that claimant failed to timely commence her proceeding before the Director, and denied claimant's request for benefits.

(1) The respondent and its insurance carrier contend claimant failed to provide respondent with timely notice of the alleged accident. The Administrative Law Judge found that claimant provided timely notice and, in addition, found that respondent had failed to prove prejudice due to the alleged lack of notice. The notice statute, K.S.A. 44-520 (Ensley), provides as follows:

> "Proceedings for compensation under the workmen's compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, shall have been given to the employer within ten (10) days after the date of the accident: *Provided,* That actual knowledge of the accident by the employer or his duly authorized agent shall render the giving of such notice unnecessary: *Provided further,* That want of notice or any defect therein shall not be a bar unless the employer prove that he has been prejudiced thereby."

Respondent and its insurance carrier contend the 1993 amendments to K.S.A. 44-520 are applicable to these alleged accidents. Effective July 1, 1993, K.S.A. 44-520, was amended to the following:

> "Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

The Appeals Board agrees with the Assistant Director that it is more probably true than not that claimant gave respondent timely notice of the alleged November 20, 1992, work-related accident. Claimant testified that on November 20, 1992, she experienced a shooting sensation in her back while moving boxes which was followed by a dull ache. Claimant did not report the accident at that time because the incident occurred after regular work hours and her direct supervisors were gone. The next day, Saturday, she had difficulty dressing and walking and spent much of the day lying around the house because of her condition. On Sunday, November 22, claimant sought medical treatment at a hospital emergency room and reported that she began having symptoms while at work the preceding Friday. After being off work due to her injuries, claimant returned to work on November 30, 1992. Claimant testified she advised her supervisor on that date about the November 20, 1992, incident. Claimant's supervisor questioned claimant regarding her time off work and even required documentation to substantiate the absence. In its efforts to acquire information, respondent contacted the hospital.

When considering the entire record, the Appeals Board finds claimant's testimony persuasive and that she provided respondent timely notice of the November 20, 1992, alleged accident.

The Appeals Board also finds that claimant provided respondent timely notice of the February 4, 1993, work-related accident. That finding is based on claimant's testimony that her supervisor was present when she experienced increased pain in her back when, on

that date, she twisted her back while sitting and performing clerical duties. Claimant testified she told her supervisor she hurt her back and was going to see a doctor as a result of that incident.

Because the record indicates claimant provided respondent notice of both the alleged incidents within ten days of their occurrence, notice is timely under both versions of K.S.A. 44-520 as quoted above.

Although the above findings render the issue moot, the Appeals Board finds the Assistant Director properly found K.S.A. 44-520 (Ensley) was applicable to these alleged accidents and also properly found respondent and its insurance carrier failed to prove prejudice. As indicated above, respondent immediately began to investigate claimant's back injury once she returned to work on November 30, 1992. During that investigation respondent required claimant to obtain certain medical records including those from the hospital emergency room which contained references to claimant experiencing back pain at work on November 20, 1992.

(2) The respondent and its insurance carrier also contend that claimant failed to serve respondent with timely written claim as required by K.S.A. 44-520a (Ensley). The parties stipulated claimant served written claim upon respondent on October 14, 1993, which is beyond 200 days of both dates of alleged accident but within one year.

As indicated above, the Appeals Board finds that claimant provided respondent with timely notice of accident. However, despite that notice respondent did not file the required accident report with the Director of the Division of Workers Compensation. Therefore, claimant had one year to file a written claim upon the respondent. Although it is true the 1993 Legislature slightly modified the language of K.S.A. 44-557 as addressed more at length below, the Appeals Board finds those modifications did not alter the long-standing rule that failure to file an accident report extends the period to serve written claim to one year. *See* Childress v. Childress Painting Co., 226 Kan. 251, 597 P.2d 637 (1979).

(3) The evidence is uncontroverted that claimant did not file an application for hearing with the Director until July 13, 1994, which is more than one year after the date of accident. Claimant does not contend that the time for filing an application was extended because of the payment of compensation or the furnishing of medical treatment.

Before the 1993 Kansas Legislature modified K.S.A. 44-557(c), the statute provided:

> "No limitation of time in the workmen's compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be **commenced before the director**

> within one (1) year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto." (Emphasis added.)

While the above-quoted language refers to proceedings "commenced before the director," the Kansas Supreme Court held that a proceeding was commenced when the injured worker served written claim upon the employer. *See* Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971), and Ricker v. Yellow Transit Freight Lines, Inc., 191 Kan. 151, 379 P.2d 279 (1963). Later, the Kansas Supreme Court in Childress held that the employer's failure to file an accident report tolled the three-year period to file an application for hearing as required by K.S.A. 44-534(b). That statute provides:

> "No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later."

In a recent decision, McClellan v. Harris Enterprises, No. 213,940, the Appeals Board found that the 1993 amendments to K.S.A. 44-557(c) were introduced and intended to address only the time requirements for serving timely written claim upon the employer. At the time of their introduction, Representative Michael R. O'Neal, Chairman of the Judiciary Committee and one of the amendments' sponsors, prepared a summary of the proposed legislation. That summary indicated the proposed amendments to K.S.A. 44-557 shortened the time to serve written claim from one year to six months when the employer failed to file an accident report. Although the proposal to shorten the written claim period was not accepted, without other known comment the Legislature amended K.S.A. 44-557(c), effective July 1, 1993, and changed the language from "must be commenced before the director within (1) one year" to "must be commenced by filing an application with the director within one year." Based upon the Legislative history as best it can be ascertained, the Appeals Board finds the legislature did not intend to shorten the time for filing an application for hearing as provided by K.S.A. 44-534(b) and inadvertently modified K.S.A. 44-557(c)'s language to create an apparent conflict with K.S.A. 44-534(b) regarding filing an application for hearing.

Respondent suggests the 1993 modifications to K.S.A. 44-557(c) can be reconciled with K.S.A. 44-534(b) by limiting the latter statute to those occasions when the employer has filed the accident report required by K.S.A. 44-557(a) and limiting K.S.A. 44-557(c) to those occasions when the required accident report has not been filed. Respondent thus argues that K.S.A. 44-534(b) and K.S.A. 44-557(c) apply to different situations and, therefore, there is no conflict. However appealing that approach may be to arrive at a simple solution, it produces a result so unreasonable, or absurd, as to indicate the Legislature did not intend that result. Under the present system, upon receiving an accident report the Division of Workers Compensation mails the injured worker an information

packet which explains the workers compensation laws and its requirements. Under respondent's attempt to reconcile K.S.A. 44-534(b) and K.S.A. 44-557(c), the worker who is provided the information packet and is theoretically knowledgeable of the Workers Compensation Act's requirements is given three years from the accident date to file a hearing application. Conversely, the worker who is not provided the information packet due to the employer's intentional or unintentional failure to file an accident report is limited to only one year to file an application for hearing. Such an interpretation would penalize the uninformed worker but reward the neglectful employer who violates the Act's provisions and who may have committed a fraudulent and abusive act as defined by K.S.A. 44-5,120(d)(20) or a criminal act as defined by K.S.A. 44-5,125.

When considering the Workers Compensation Act as a whole, it is incongruous to strictly interpret K.S.A. 44-557(c) to permit an employer to benefit from and avoid providing workers compensation benefits but at the same time be penalized and rendered subject to criminal sanctions and civil litigation by failing to file a required accident report. *See* K.S.A. 44-5,120, 44-5,121, and 44-5,125.

The Workers Compensation Act is to be liberally construed to bring employers and employees within the Act's provisions. *See* K.S.A. 1992 Supp. 44-501(g). When interpretation of one section of the Workers Compensation Act appears to conflict with another section, the entire Act should be construed according to its spirit and reason, disregarding as may be necessary the strict letter of the law. McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996). As a general rule, statutes are construed to avoid unreasonable results. Wells v. Anderson, 8 Kan. App. 2d 431, 659 P.2d 833, rev. denied 233 Kan. 1093 (1983).

Because the legislative history does not indicate the Legislature intended to modify the time period to file an application for hearing otherwise provided for in K.S.A. 44-534(b) and because applying K.S.A. 44-557(c) in contravention of K.S.A. 44-534(b) yields an unreasonable and incongruous result which cannot be reasonably explained, the Appeals Board finds that K.S.A. 44-534(b) controls the time for filing an application for hearing. Therefore, claimant's hearing application was timely filed as it was filed within three years of both dates of alleged accident.

Because there are issues which the Assistant Director did not address, and because the Appeals Board advised the parties the proceeding would be remanded if it found in claimant's favor, in fairness to the parties and in conformance to those statements made at oral argument, the Appeals Board finds this matter should be remanded to the Assistant Director to address the remaining issues.

The Appeals Board hereby adopts the Assistant Director's findings and conclusions to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated April 24, 1996, should be, and hereby is, set aside and that this proceeding is remanded to the Assistant Director to address the remaining issues.

IT IS SO ORDERED.

Dated this ____ day of March 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Norman R. Kelly, Salina, KS
John W. Mize, Salina, KS
David G. Shriver, McPherson, KS
Office of Administrative Law Judge, Salina, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director